Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 79-161

PHILIP ABBOTT MASQUELETTE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

JURISDICTIONAL STATEMENT

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v.

THE STATE OF TEXAS,
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ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

JURISDICTIONAL STATEMENT

Philip Abbott Masquelette, the appellant, appeals from the final judgment of the Court of Criminal Appeals of Texas, dated May 2, 1979, as against the appellant's claim that Section 169B, Uniform Act Regulating Traffic on Highways, as amended (Article 6701d, Vernon's Annotated Texas Statutes) is repugnant to the Republican Government Clause, Article Four, Section 4, of the Constitution of the United States, and the Joint

Resolutions of Congress approved March 1, 1845, 5 Stat. 797, and December 29, 1845, 9 Stat. 108; said judgment further holding that the appellant was not denied due process and equal protection of the laws under the Fourteenth Amendment of the Constitution of the United States by undergoing two successive trials before non-lawyer judges; and also holding that the evidence was sufficient to support the conviction under a speeding complaint alleging that the prima facie reasonable and prudent speed limit for operating and driving a vehicle upon the public streets and highways of Texas was 55 miles per hour.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which appears in the Appendix hereto, p. A-2, *infra*, is reported at 579 S.W.2d 478.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas, affirming a conviction for speeding under Section 169B, Uniform Act Regulating Traffic on Highways, as amended (Article 6701d, Vernon's Annotated Texas Statutes), was entered on March 21, 1979. See p. A-1, *infra*. A motion for rehearing *en banc* and amended motion for rehearing *en banc* were entertained and denied on May 2, 1979, with Judge Clinton dissenting.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

QUESTIONS PRESENTED

1. Whether Section 169B, Uniform Act Regulating Traffic on Highways, as amended (Article 6701d, Vernon's Annotated Texas Statutes) is repugnant to the Republican Government Clause of the Constitution of the United States, and the Joint Resolutions of Congress approved March 1, 1845, 5 Stat. 797, and December 29, 1845, 9 Stat. 108.

2. Whether the accused, who was subject to a cash fine, arrest and imprisonment in the event of nonpayment, and possible loss of his driver's license, was denied due process of law under the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States when tried on a speeding charge before a non-lawyer justice of the peace with a later trial *de novo* before a non-lawyer county judge, under the Texas two-tier court system applicable to misdemeanor criminal offenses.

3. Whether a State denies an accused equal protection of the laws under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States by providing law-trained judges for some county courts and allowing lay judges for others, where the provisions of the highway traffic laws were to be applicable and uniform throughout the State.

4. Whether the evidence was sufficient to support the conviction for speeding.

CONSTITUTIONAL PROVISIONS AND STATUTES

Article Four, Section 4, of the Constitution of the United States

The United States shall guarantee to every State in this Union a Republican Form of Government. . . .

Joint Resolution of Congress approved March 1, 1845

The territory properly included within . . . the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government. . .

Said State is to be formed . . . and the Constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six.

Joint Resolution of the Congress of the Republic of Texas approved June 23, 1845

[T]he Government of Texas doth consent, that the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, with a Republican form of government. . .

Ordinance in Convention of the People of the Republic of Texas, July 4, 1845

. . .We, the deputies of the people of Texas in Convention assembled, in their name and by their authority, do ordain and declare, that we assent to, and accept the

proposals, conditions and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.

Article One, Section 1, Constitution of the Republic of Texas adopted March 17, 1836

The powers of this government shall be divided into three departments, viz.: legislative, executive and judicial, which shall remain for ever separate and distinct.

Article One, Section 20, Constitution of the State of Texas, adopted August 27, 1845

No power of suspending laws in this State shall be exercised, except by the Legislature, or by its authority.

Article Two, Section 1, Constitution of the State of Texas, adopted August 27, 1845

The powers of the Government of the State of Texas shall be divided into three separate departments, and each of them be confided to a separate body of magistracy—to-wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being one of those departments, shall exercise any power, properly attached to either of the others, except in the instances herein expressly permitted.

Joint Resolution of Congress approved December 29, 1845

WHEREAS, the Congress of the United States, by a joint resolution approved March the first, eighteen hundred and forty-five, did consent that the territory prop-

erly included within, and rightfully belonging to the Republic of Texas, might be erected into a new State, to be called the State of Texas, with a republican form of government. . . and whereas, the people of the said Republic of Texas, by deputies in convention assembled, with the consent of the existing government, did adopt a Constitution, and erect a new State with a republican form of government . . . and whereas, the said Constitution, with the proper evidence of its adoption by the people of the Republic of Texas, has been transmitted to the President of the United States and laid before Congress, in conformity to the provisions of said joint resolution: therefore,

Resolved . . . That the State of Texas shall be one . . . of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

Article 6701d, Section 26, Vernon's Annotated Texas Statutes

Section 26. The provisions of this Act shall be applicable and uniform throughout this State . . .

Article 6701d, Section 169B, Vernon's Annotated Texas Statutes

Section 169B. (a) If the State Highway Commission finds that the facts specified in Subsection (b) of this section exist, it may enter an order establishing maximum prima facie speed limits. . . . When speed limits established under this section are in effect, they prevail over any other established speed limit which would permit a person to operate a motor vehicle at a higher rate of speed. . . .

(i) Any change in speed limits under this section shall be effective for a maximum of 120 days, unless the commission make a finding prior to the expiration of the 120 day period that the conditions specified under Section 169B, Subsection (b), continue to exist. If such conditions are found to still exist such limits may be continued in effect for additional 120 day periods.

Fourteenth Amendment, Section 1, of the Constitution of the United States

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

RAISING THE FEDERAL QUESTION

At the earliest stage of the trial *de novo* before a non-lawyer county judge the appellant raised the claim, in a pre-trial motion to disqualify the judge, that under the Fifth and Fourteenth Amendments of the Constitution of the United States, the appellant was entitled to a trial before a judge who is a licensed attorney, citing *North v. Russell*, 427 U.S. 328 (1976). This motion was overruled by the trial judge. The appellant then filed a pre-trial motion to dismiss the speeding complaint based on the court's overruling the motion to disqualify the judge, claiming denial of due process of law and equal protection of the laws under the Constitution of the United States and the Texas Constitution. This motion was also overruled.

These Fifth and Fourteenth Amendment claims were reiterated by the appellant before the Court of Criminal

Appeals of Texas. There he moved that the judgment of conviction by the county court be set aside and that the cause be in all things dismissed against him on the grounds that he was entitled to a trial before a judge who was a licensed attorney under each of the Fifth Amendment and Section 1 of the Fourteenth Amendment (Due Process and Equal Protection Clauses), again citing the *North* case. The Court of Criminal Appeals of Texas expressly rejected the Fourteenth Amendment claim, 579 S.W.2d at 479, and held the *North* case not dispositive of the issue, *id.* at 480.

Appellant again raised the Due Process claim in his motion for rehearing *en banc* in the Court of Criminal Appeals of Texas, and also attacked the constitutionality of the speeding statute under Article Four, Section 4, of the Constitution of the United States, as violative of the Separation of Powers doctrine expressed in the Texas Constitution of 1845 having the force and effect of federal law by reason of the legislative process embodied in two Joint Resolutions of Congress approved that year. Although the rehearing *en banc* was denied by the Court of Criminal Appeals of Texas, with one dissent but without any written opinion, that court thus considered and rejected all of the federal constitutional claims made by the appellant at the various stages of his trial and appeal.

STATEMENT OF THE CASE

The appellant was convicted in the Justice Court of Fayette County, Texas, Precinct No. 1, of the offense of speeding, and he appealed to the County Court of Fayette County, Texas. In his trial *de novo* in the latter court he was convicted of the offense of speeding under

Article 6701d, Vernon's Annotated Texas Statutes. Punishment was assessed by the County Court at a fine of $101.00 plus court costs. This conviction was appealed to the Court of Criminal Appeals of Texas, which affirmed the conviction. 579 S.W.2d 478 (Tex. Crim. App. 1979).

Although the Article Four, Section 4, and Fifth Amendment and Equal Protection claims were timely presented to the Court of Criminal Appeals of Texas, that court ruled only on the federal Due Process claim, holding that the trial before a non-lawyer county judge was constitutional (579 S.W.2d at 479-480):

> Initially, appellant contends that he was denied due process of law under the Fourteenth Amendment to the United States Constitution when he was tried before a non-lawyer county judge.
>
> In *Ex Parte Ross,* 522 S.W.2d 214 (Tex. Cr. App.), cert. denied, 423 U.S. 1018, 96 S.Ct. 454, 46 L.Ed.2d 390 (1975), this Court noted that there is no constitutional or statutory requirement in Texas that a county judge be an attorney. The only qualification concerning legal knowledge or training is that a county judge be "well informed in the law of the State." Art. 5, Sec. 15 Constitution of Texas. *See also* Art. 1927, V.A.C.S. *Ex parte Ross,* supra, was decided in accordance with two prior Texas cases, *Ex parte Craig,* 150 Tex. Cr. R. 598, 193 S.W.2d 178 (1946), and *Little v. State ex rel. Parsel,* 75 Tex. 616, 12 S.W. 965 (1890). The appellant argues that the recent decision of the United States Supreme Court in *North v. Russell,* 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976), mandates a reconsideration of our holding in *Ross.*
>
> In *North,* the specific question presented to the United States Supreme Court was whether an ac-

> cused subject to possible imprisonment was denied due process when he was tried before a non-lawyer police court judge. The Supreme Court declined to decide whether a defendant may be convicted and imprisoned when the only trial afforded him is before a lay judge, however, as Kentucky procedure entitled him to a trial de novo before a lawyer judge. Cf. *Ludwig v. Massachusetts,* 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976). Thus, *North* is not dispositive on this issue.
>
> Appellant has presented no other reason for us to depart from our holding in *Ross,* and we decline to do so. Appellant's contention that he was improperly tried before a non-lawyer judge is overruled.

The court then passed on the delegation of the Legislature's authority, attacked by the appellant as violating the Separation of Powers doctrine (579 S.W.2d at 480):

> Appellant next contends that Art. 6701d, Sec. 169B, V.A.C.S., the statute enabling the State Highway and Public Transportation Commission to set temporary maximum speed limits, is unconstitutional. He maintains that this statute is an unconstitutional delegation of the Legislature's authority.

After discussing various Texas cases and the provisions of Article 6701d, Section 169B, Vernon's Annotated Texas Statutes, the court held the statute not to be an unconstitutional delegation of the Texas Legislature's authority. *Id.,* at 481.

THE QUESTIONS ARE SUBSTANTIAL

The question of the application of Article IV, Section 4, of the Constitution of the United States, and two Joint Resolutions of Congress approved in 1845 guaran-

teeing Texas citizens a republican form of government and separation of powers in their state government, to a state speeding statute, upon which the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2), is a novel and substantial one. It has never been treated before by this Court.

At stake is the constitutionality of the Texas statute under which the executive branch of the state government seeks to impose a motor vehicle speed limit of 55 miles per hour upon the public during the current energy crisis. The court below has ruled the statute constitutional under Article Two, Section 1, of the Texas Constitution, which provides for division of the state government into legislative, executive and judicial departments.

In its opinion the court below, however, failed to address the questions of the constitutionality of the statute under the Constitution of the United States or whether the statute was repugnant to two Joint Resolutions of Congress approved in 1845, even though these questions were raised by the appellant. The appellant's position is that the applicable provisions of the Texas Constitution have the force and effect of federal law, and that the appellant's federal constitutional rights are involved in this case. By ignoring these questions the court below has indirectly decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court.

This Court may take judicial notice of the current energy crisis and its impact upon the general welfare of the nation from the standpoints of inflation, un-

employment and national security. Texas is one of the most populous states in the union, and it has the largest system of public streets and highways. The use of energy is directly affected by the manner in which the traffic laws of the state are enforced. The issues raised in this case are therefore of general public importance.

Of greater concern, however, is the matter of denial of due process under the Fourteenth Amendment to Texas citizens who are tried for various misdemeanor offenses before non-lawyer judges under the Texas two-tier court system of criminal courts. The Texas system, which may be distinguished from the Kentucky two-tier court system considered in *North v. Russell,* 427 U.S. 328 (1976), has not been reviewed by this Court following its decision in the *North* case.

The leading case supporting the proposition that a non-lawyer judge may not hear a case involving possible imprisonment, unless the accused or his counsel waives the right to have a lawyer judge preside, is *Gordon v. Justice Court,* 12 Cal.3d 323, 115 Cal.Rptr. 632, 525 P.2d 72 (1974), *cert. denied,* 420 U.S. 928 (1976). *Gordon* was cited in a footnote to this Court's opinion in *North v. Russell,* 427 U.S. at 340, n. 1.

Following this Court's approval of the Kentucky two-tier system in *North,* the courts of several states have examined their own systems in the light of that decision: *People v. Sabri,* 47 Ill. App. 3d 962, 6 Ill. Dec. 104, 362 N.E.2d 739 (Ill. App. 1977); *Jenkins v. Canaan Municipal Court,* 366 A.2d 208 (N.H. 1976); *People v. Skrynski,* 42 N.Y.2d 218, 366 N.E.2d 797 (1977); *State v. Duncan,* 238 S.E.2d 205 (S.C. 1977); *Shoemake*

v. State, 375 A.2d 431 (Del. 1977); *Treiman v. State ex rel. Miner,* 343 So.2d 819 (Fla. 1977). These cases are illustrative of the conflicts among the decisions of state courts in the use of non-lawyer judges in inferior state courts.

All of these cases are distinguishable on the facts from the instant case in that:

(a) the justice of the peace in Fayette County, Texas, is a non-lawyer;

(b) the county judge of Fayette County is a non-lawyer;

(c) there was no alternative procedure for trial of the speeding offense charge in a court having a judge who is a lawyer;

(d) there was no plea of guilty; and

(e) objection was made prior to the commencement of the trial as to the denial of due process under the Fourteenth Amendment by reason of the trial before the non-lawyer county judge.

Serious consequences to the appellant in this case could result from final conviction of the appellant. The appellant was fined $101.00 plus court costs. Under Articles 43.01 through 43.13, Texas Code of Criminal Procedure, the appellant was in danger of being arrested and imprisoned in jail in the event of nonpayment of the fine and court costs. In addition, if the appellant were found by the Texas Department of Public Safety to be a "habitual violator" of the traffic law, by reason of four (4) or more convictions for moving violations of the traffic laws arising out of different transactions in a con-

secutive period of twelve (12) months, or seven (7) or more convictions arising out of different transactions within a period of twenty-four (24) months, then under Article 6687b, Section 22(b)(4), Vernon's Annotated Texas Statutes, the appellant could have his Texas driver's license suspended or revoked.

Losing one's driver's license is more serious for some individuals that a brief stay in jail. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Messrs. Justice Powell and Rehnquist concurring, stated (407 U.S. at 48):

> Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken-driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals than a brief stay in jail. In Bell v. Burson, 402 US, 535, 29 L Ed 2d 90, 91 S Ct 1586 (1971), we said:
>
> "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment." Id., at 539, 29 L Ed 2d at 94. (Footnote omitted.)

CONCLUSION

The appellant submits that this Court cannot sanction the procedure under which a Texas citizen can be subjected to fine and imprisonment and possible loss of his driver's license under an unconstitutional statute enforced under a two-tier court system of lay judges.

The appellant believes that the discussion above demonstrates that the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution. Consider, too, that the decisions of the highest state courts are in conflict on substantial aspects of the questions presented with respect to trials before non-lawyer judges.

If this Court should conclude that the ruling of the court below does not bring this case within the Court's jurisdiction (Rule 15(1)(d) of this Court), then review of this case is sought upon petition for certiorari (Rule 23(1)(j) of this Court).

Respectfully submitted,

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A-1

PHILIP ABBOTT MASQUELETTE,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

No. 56034

Court of Criminal Appeals of Texas,

Panel No. 3

March 21, 1979.

Rehearing En Banc Denied May 2, 1979.

Defendant was convicted in the County Court, Fayette County, Fritz Lobpries, J., of speeding, and he appealed. The Court of Criminal Appeals, Tom G. Davis, J., held that: (1) defendant was not denied due process of law under Fourteenth Amendment when he was tried before nonlawyer county judge; (2) statute enabling State Highway and Public Transportation Commission to set temporary maximum speed limits is not an unconstitutional delegation of Legislature's authority; (3) subject of statute is properly set out in title of enacting bill and is not unconstitutional on that ground; (4) although State did not present sufficient predicate to support admission of radar evidence, defendant's failure to object to radar evidence waived any error, and (5) trial court could take judicial notice of posted speed at place of violation established by Commission through proclamation of Governor.

Affirmed.

* * *

Philip Abbott Masquelette, pro se.

Robert Huttash, State's Atty., Austin, for the State.

Before DOUGLAS and TOM G. DAVIS, JJ.

OPINION

TOM G. DAVIS, Judge.

Appeal is taken from a conviction for speeding under Art. 6701d, Secs. 166 and 169B, V.A.C.S. Punishment was assessed by the court at a fine of $101.00.

The record reflects that this case was originally tried in the Justice of the Peace Court, Precinct No. 1, of Fayette County. Appeal was taken to the County Court of Fayette County. The present appeal is from appellant's conviction in the county court.

Initially, appellant contends that he was denied due process of law under the Fourteenth Amendment to the United States Constitution when he was tried before a non-lawyer county judge.

In *Ex parte Ross,* 522 S.W.2d 214 (Tex. Cr. App.), cert. denied, 423 U.S. 1018, 96 S.Ct. 454, 46 L.Ed.2d 390 (1975), this Court noted that there is no constitutional or statutory requirement in Texas that a county judge be an attorney. The only qualification concerning legal knowledge or training is that a county judge be "well informed in the law of the State." Art. 5, Sec. 15, Constitution of Texas. *See also* Art. 1927, V.A.C.S. *Ex parte Ross,* supra, was decided in accordance with two prior Texas cases, *Ex parte Craig,* 150 Tex. Cr. R. 598, 193 S.W.2d 178 (1946), and *Little v. State ex rel. Parsel,* 75 Tex. 616, 12 S.W. 965 (1890). The appellant

argues that the recent decision of the United States Supreme Court in *North v. Russell,* 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976), mandates a reconsideration of our holding in *Ross.*

In *North,* the specific question presented to the United States Supreme Court was whether an accused subject to possible imprisonment was denied due process when he was tried before a non-lawyer police court judge. The Supreme Court declined to decide whether a defendant may be convicted and imprisoned when the only trial afforded him is before a lay judge, however, as Kentucky procedure entitled him to a trial de novo before a lawyer judge. Cf. *Ludwig v. Massachusetts,* 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976). Thus, *North* is not dispositive on this issue.

[1] Appellant has presented no other reason for us to depart from our holding in *Ross,* and we decline to do so. Appellant's contention that he was improperly tried before a non-lawyer judge is overruled.

Appellant next contends that Art. 6701d, Sec. 169B, V.A.C.S., the statute enabling the State Highway and Public Transportation Commission to set temporary maximum speed limits, is unconstitutional. He maintains that this statute is an unconstitutional delegation of the Legislature's authority.

In *Ex parte Smith,* 441 S.W.2d 544, this Court reviewed the constitutionality of Art.6701c-3, V.A.C.S. This statute delegated the authority to set minimum safety standards for motorcycle helmets to the Department of Public Safety. Riding a motorcycle without a helmet so approved was a criminal violation. This Court held

that the delegation of that authority to the Department of Public Safety was constitutional.

In *Ex parte Granviel*, 561 S.W.2d 503, this Court was again faced with a challenge to the constitutionality of a statute based on its delegation of authority to an agency. This Court stated:

> "Generally, a legislative body, after declaring a policy and fixing a primary standard, may delegate to the administrative tribunal or officer power to prescribe details, *Margolin v. State*, 151 Tex.Cr.R. 132, 205 S.W.2d 775 (1947); *Williams v. State*, 146 Tex.Cr.R. 430, 176 S.W.2d 177 (1943), such as to establish rules, regulations or minimum standards reasonably necessary to carry out the expressed purpose of the act. *Beall Medical Surgical Clinic and Hospital, Inc. v. State Board of Health*, 364 S.W.2d 755 (Tex.Civ.App.—Dallas, 1963), and cases there cited.
>
> "Thus, the existence of an area for exercise of discretion by an administrative officer under delegation of authority does not render delegation unlawful where standards formulated for guidance and limited discretion, though general, are capable of reasonable application. *Nichols v. Dallas*, supra [347 S.W.2d 326 (Tex.Civ.App.—Dallas, 1961)], and cases there cited. So long as the statute is sufficiently complete to establish the regulation of the particular matters falling within the Legislature's jurisdiction, the matters of detail that are reasonably necessary for the ultimate application, operation and enforcement of the law may be expressly delegated to the authority charged with the administration of the statute. *Commissioners Court of Lubbock v. Martin*, supra [471 S.W.2d 100 (Tex.Civ.App.—Amarillo, writ ref'd., n.r.e.)].

> "In *Langford v. State*, supra [532 S.W.2d 91 (Tex. Cr.App. 1976)], this court decided that Article 6701/1-5, V.A.C.S., did not contain an unconstitutional delegation of legislative powers to the Texas Department of Public Safety in allowing said department to approve methods of breath testing nor in authorizing said department to ascertain the qualifications and competence of individuals who conduct breath testing. See and cf. *Ex parte Smith*, 441 S.W.2d 544 (Tex.Cr.App. 1969)."

561 S.W.2d at 514-15.

Article 6701d, Sec. 169B, supra, provides that the State Highway and Public Transportation Commission may establish maximum prima facie speed limits of not more than 70 miles per hour when it finds:

> "1. That a severe shortage of motor fuel or other petroleum products exists; and
>
> "2. That the shortage was caused by war, national emergency or other circumstances; and
>
> "3. That a reduction of speed limits will serve to foster conservation purposes and safety; or
>
> "4. The failure to alter state speed limits will prevent the state from receiving revenue for highway purposes from the federal government."

The section further provides that upon the entry of such an order it shall be filed with the Governor's Office. After an independent review, the Governor issues a proclamation stating whether or not the necessary facts exist to support the issuance of the Commission's order. The section also provides that any change in the maximum speed limits made under this section remain effec-

tive for a maximum of 120 days unless such conditions are found to continue to exist, in which case the order may be continued in effect for additional 120-day periods.

[2] Thus, Art. 6701d, Sec. 169B, contains standards that limit the discretion of the Commission in its exercise of these delegated powers. These standards are necessary to effect the Legislature's purpose and are capable of reasonable application. We hold that Art. 6701d, Sec. 169B, supra, is not an unconstitutional delegation of the Legislature's authority.

[3] Appellant also contends that the subject of Art. 6701d, Sec. 169B, was not properly set out in the title of the enacting bill, and is thus unconstitutional under Art. 3, Sec. 35 of the Texas Constitution. We have reviewed this contention and find it without merit.

Appellant finally contends that the evidence was insufficient to support the conviction.

The State's case consisted of the testimony of A. F. Hall, a Texas Highway Patrolman. Officer Hall first testified that he was "working radar" on Interstate 10 near Flatonia. He then stated that "the [appellant] was checked by radar at a speed of 67 miles per hour" and that he gave the appellant a ticket for speeding.

Appellant objected to the officer's next answer, which asserted that it was his personal belief that the appellant was speeding. The trial court sustained this objection. The officer then testified without objection that the appellant was not driving at a speed that was reasonable and prudent under the conditions.

The State rested its case after the above evidence. The appellant called no witnesses regarding the facts of the offense.

Appellant first urges that the State failed to show three essential elements in introducing evidence based on radar monitoring of his speed. He urges that this Court's decision in *Wilson v. State*, 168 Tex.Cr.R. 439, 328 S.W.2d 311, requires that the State show that (1) the witness was qualified in the use of radar, (2) that the apparatus be accepted as dependable by the profession concerned with that branch of science, and (3) that the particular radar unit be of an accepted type and in good condition.

[4] Subsequent to our decision in *Wilson v. State*, supra, this Court has held that the officer's testimony that he had been both trained to operate the radar set and test it for accuracy is a sufficient predicate to support admission of radar evidence. *Cromer v. State*, 374 S.W. 2d 884; *Gano v. State*, 466 S.W.2d 730. Thus, as specifically stated in *Cromer*, the State is not required to call expert witnesses to establish the accuracy of radar.

In the present case, however, the officer did not testify as to his training and testing of the radar set. We note that his testimony regarding the speed reflected by his radar unit was not objected to by the appellant. Thus, we must decide whether the failure to elicit a proper predicate for his testimony renders the evidence insufficient to support a conviction.

In *Romo v. State*, 577 S.W.2d 251 (1979), this Court reviewed a similar situation. In *Romo*, the results of a breathalyzer test had been entered into evidence without

any predicate as to the officer's qualifications or the breathalyzer's accuracy. In *Romo,* as here, no objection was made to the officer's testimony. This Court held that although the State failed to prove the proper predicate for admission of the breathalyzer test results, this error was not preserved for review because of the failure to object.

[5] In the present case, the appellant failed to object to introduction of the radar evidence. Here, as in *Romo,* the appellant's failure to object at the time the evidence was offered waived any error.

The appellant also urges that the State failed to establish the posted speed at the place of the violation. Appellant maintains that the trial court could not take judicial knowledge of this fact.

In *Williams v. State,* 146 Tex. Cr. R. 430, 176 S.W.2d 177 (1943), it was stated:

> "A proclamation of the Chief Executive of this State, when duly promulgated and filed, occupies a position comparable to laws regularly passed by the Legislature. That a proclamation by the Governor, of and within itself, is notice is further manifested by the fact that the courts are required to take, and do take, judicial notice of the contents thereof. *Missouri, K. & T. R. Co. v. McIlhaney,* 60 Tex. Civ. App. 598, 129 S.W. 153, and 20 Am.Jur. 67." See also 23 Tex.Jur.2d, Evidence, Sec. 11.

By minute order No. 69755 passed on March 31, 1975, the State Highway and Public Transportation Commission established the maximum prima facie speed limit in this state at 55 miles per hour. The Governor of Texas issued and placed on file in the office of the

Secretary of State Proclamation No. 41-1531 on April 4, 1975, finding that the necessary facts exist to support the issuance of such Commission's order. The date of the alleged offense, June 9, 1975, was within 120 days of April 4, 1975.

[6] The trial court could take judicial notice that the maximum prima facie speed limit in the State of Texas was 55 miles per hour at the time of the appellant's offense.

We hold that the evidence is sufficient to support the conviction.

The judgment is affirmed.

IN THE COURT OF CRIMINAL APPEALS
At Austin, Texas

NO. 56,034

PHILIP ABBOTT MASQUELETTE,
Appellant

v.

THE STATE OF TEXAS,
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that PHILIP ABBOTT MASQUELETTE, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Criminal Appeals of Texas, affirming the judgment of conviction, entered herein on March 21, 1979, on which the Appellant's Motion for Rehearing En Banc was denied on May 2, 1979.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

/s/

PHILIP ABBOTT MASQUELETTE
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1300 Main Street
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Telephone: (713) 651-9977
Appellant, pro se

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal to the Supreme Court of the United States was mailed this 25th day of May, 1979, to each of the following:

Dan R. Beck, Esq.
County Attorney of Fayette County
County Courthouse
La Grange, Texas 78945

The Honorable William P. Clements, Jr.
Governor of Texas
State Capitol
Austin, Texas 78711

The Honorable Mark White
Attorney General of Texas
Austin, Texas 78711

/s/

PHILIP ABBOTT MASQUELETTE

(Filed in the Court of Criminal Appeals of Texas May 29, 1979)

TEXAS SESSION LAWS 1973

General and Special
Sixty-Third Legislature, First Called Session
Traffic Regulations—Temporary Speed Limits

CHAPTER 1
S. B. No. 1

An Act relating to the establishment of temporary speed limits on highways in the state under certain circumstances; specifying procedures for establishing such speed limits; providing for notice to the public; adding Section 169B to the Uniform Act Regulating Traffic on Highways, as amended (Article 6701d, Vernon's Texas Civil Statutes); providing a severability clause; and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. The Uniform Act Regulating Traffic on Highways, as amended (Article 6701d, Vernon's Texas Civil Statutes), is amended by adding[1] Section 169B to read as follows:

"Sec. 169B. (a) If the State Highway Commission finds that the facts specified in Subsection (b) of this section exist, it may enter an order establishing maximum prima facie speed limits of not more than seventy (70) miles per hour applicable to all highways in this state, including highways under the control of the Texas Turnpike Authority, incorporated cities and towns, and counties. An order entered under this section does not have the effect of increasing a speed limit on any highway. The limits established under this section are prima facie

1. Vernon's Ann. Civ. St. art. 6701d, § 169B.

prudent and reasonable speed limits enforceable in the same manner as prima facie limits established under other provisions of this article. When speed limits established under this section are in effect, they prevail over any other established speed limit which would permit a person to operate a motor vehicle at a higher rate of speed, but do not apply to vehicles permitted to exceed established limits under Sections 24 and 172 of this Act.

"(b) An order issued under Subsection (a) of this section is justified if the commission finds the following facts exist, which must be stated in the order:

"(1) That a severe shortage of motor fuel or other petroleum product exists; and

"(2) That the shortage was caused by war, national emergency or other circumstances; and

"(3) That a reduction of speed limits will serve to foster conservation purposes and safety; or

"(4) The failure to alter state speed limits will prevent the state from receiving revenue for highway purposes from the federal government.

"(c) Unless a specific speed limit is required by federal law or directive under threat of loss of federal highway funds then the State Highway Commission may not set maximum prima facie speed limits under this section of all vehicles below sixty (60) miles per hour.

"(d) Before the commission may enter an order establishing a maximum prima facie speed limit, it must hold a public hearing preceded by the publication in at least three newspapers of general circulation in the state of a notice of the date, time, and place of the hearing

and of the action proposed to be taken. The notice must be published at least 12 days before the date of the hearing. At the hearing, all interested persons may present oral or written testimony regarding the proposed order.

"(e) When the commission enters an order under this section, it shall file the order in the office of the governor. The governor shall then undertake an independent finding of fact and determine the existence of the facts in Subdivisions (1), (2), (3) or (4) of Subsection (b) of this section. Before the eighth day after the order is filed in his office, the governor shall conclude his finding of fact, issue a proclamation stating whether the necessary facts exist to support the issuance of the commission's order, and file copies of the order and his proclamation in the office of the secretary of state.

"(f) If the governor's proclamation states that the facts necessary to support the issuance of the commission's order exist, the order takes effect according to Subsection (g) of this section. Otherwise, the order has no effect.

"(g) In an order issued under this section, the commission may specify the date on which the order takes effect, but that date may not be sooner than the eighth day after the order is filed with the governor. If the order contains no effective date, it takes effect on the 21st day after it is filed with the governor. Unless the order by its own terms expires earlier, it remains in effect until a subsequent order adopted by the procedure prescribed by this section amends or repeals it, except that

any order adopted under this section expires when this section expires. The procedure for repealing an order is the same as for adopting an order except that the commission and the governor must find that the facts required to support the issuance of an order under Subsection (b) of this section no longer exist.

"(h) When an order is adopted in accordance with this section, the commission and all governmental authorities responsible for the maintenance of highway speed limit signs shall proceed with appropriate action to conceal or remove all signs which give notice of a speed limit higher than the one contained in the order and to erect appropriate signs. All governmental entities having responsibility for administration of traffic safety programs and the enforcement of traffic laws shall also proceed to use all available resources to notify the public of the effect of the order, and to accomplish this purpose they are directed to seek to enlist the cooperation of all news media in the state.

"(i) Any change in speed limits under this section shall be effective for a maximum of 120 days, unless the commission makes a finding prior to the expiration of the 120 day period that the conditions specified under Section 169B, Subsection (b) continue to exist. If such conditions are found to still exist such limits may be continued in effect for additional 120 day periods.

"(j) This section expires on April 1, 1975."

Sec. 2. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without

the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 3. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Passed the senate on December 18, 1973: Yeas 20, Nays 10; December 20, 1973, senate refused to concur in house amendment and requested appointment of Conference Committee; December 20, 1973, house granted request of the senate; December 20, 1973, senate adopted Conference Report: Yeas 21, Nays 5; passed the house with amendments on December 20, 1973: Yeas 99, Nays 37, five present not voting; December 20, 1973, house granted request of the senate for appointment of Conference Committee; December 20, 1973, house adopted Conference Report: Yeas 104, Nays 25, 3 present not voting.

Approved Dec. 21, 1973.

Effective Dec. 21, 1973.

ARTICLES OF ANNEXATION*

For Annexing Texas to the United States
Joint Res. March 1, 1845, 5 U.S. Stat. 797

Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress doth consent that the territory properly included within, and rightly belonging to the Republic of Texas, may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same may be admitted as one of the States of this Union.

2. *And be it further resolved,* That the foregoing consent of Congress is given upon the following conditions, and with the following guarantees, to wit: *First.* Said State to be formed, subject to the adjustments by this government of all questions of boundary that may arise with other governments; and the Constitution thereof, with the proper evidence of its adoption by the people of said Republic of Texas, shall be transmitted to the President of the United States, to be laid before Congress for its final action, on or before the first day of January, one thousand eight hundred and forty-six. *Second.* Said State, when admitted into the Union, after ceding to the United States all public edifices, fortifications, barracks, ports and harbors, navy and navy-yards, docks, maga-

* The State of Texas was admitted into the Union on the 29th December, 1845, and from that day the laws of the United States were extended over it. Consequently, on the 30th of January, 1846, the revenue laws of Texas were not in force there. (Calkin & Co. v. Cocke, 14 Howard's Rep.; Lee v. King, 21 Texas 577.)

zines, arms, armaments, and all other property and means pertaining to the public defence belonging to the said Republic of Texas, shall retain all the public funds, debts, taxes, and dues of every kind, which may belong to or be due and owing said Republic; and shall also retain all the vacant and unappropriated lands lying within its limits, to be applied to the payment of the debts and liabilities of said Republic of Texas, and the residue of said lands, after discharging said debts and liabilities, to be disposed of as said State may direct; but in no event are said debts and liabilities to become a charge upon the government of the United States. *Third.* New States, of convenient size, not exceeding four in number, in addition to said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal Constitution. And such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise Line, shall be admitted into the Union, with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri Compromise Line, slavery, or involuntary servitude, (except for crime,) shall be prohibited.

3. *And be it further resolved,* That if the President of the United States shall, in his judgment and discretion, deem it most advisable, instead of proceeding to submit the foregoing resolution to the Republic of Texas, as an overture on the part of the United States for admission, to negotiate with that Republic; then,

Be it resolved, That a State, to be formed out of the present Republic of Texas, with suitable extent and boundaries, and with two Representatives in Congress, until the next apportionment of representation, shall be admitted into the Union, by virtue of this act, on an equal footing with the existing States, as soon as the terms and conditions of such admission, and the cession of the remaining Texian territory to the United States shall be agreed upon by the Governments of Texas and the United States: And that the sum of one hundred thousand dollars be, and the same is hereby, appropriated to defray the expenses of missions and negotiations, to agree upon the terms of said admission and cession, either by treaty to be submitted to the Senate, or by articles to be submitted to the two Houses of Congress, as the President may direct.

Approved, March 1, 1845.

JOINT RESOLUTION

Of the Congress of the Republic of Texas

Giving the Consent of the Existing Government to the Annexation of Texas to the United States

---

WHEREAS, the Government of the United States hath proposed the following terms, guarantees, and conditions, on which the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, and admitted as one of the States of the American Union, to wit:

[Here follow the first and second sections of the resolution of the Congress of the United States, see page A-17]

And whereas, by said terms, the consent of the existing government of Texas is required—Therefore,

Be it resolved by the Senate and House of Representatives of the Republic of Texas in Congress assembled, That the Government of Texas doth consent, that the people and territory of the Republic of Texas may be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, in order that the same may be admitted as one of the States of the American Union; and said consent is given on the terms, guarantees, and conditions set forth in the preamble to the joint resolution.

SEC. 2. *Be it further resolved,* That the proclamation of the President of the Republic of Texas, bearing date May fifth, eighteen hundred and forty-five, and the elec-

tion of deputies to sit in convention at Austin, on the fourth day of July next, for the adoption of a Constitution for the State of Texas, had in accordance therewith, hereby receives the consent of the existing Government of Texas.

SEC. 3. *Be it further resolved,* That the President of Texas is hereby requested immediately to furnish the Government of the United States, through their accredited minister near this Government, with a copy of this joint resolution; also to furnish the convention to assemble at Austin, on the fourth of July next, a copy of the same. And the same shall take effect from and after its passage.

Approved, June 23, 1845.

AN ORDINANCE

In Convention of the People of the Republic of Texas, July 4, 1845.

Manifesting Assent of the People to the Terms and Conditions of Annexation

WHEREAS the Congress of the United States of America has passed resolutions providing for the annexation of Texas to that Union, which resolutions were approved by the President of the United States on the first day of March, one thousand eight hundred and forty-five; and whereas the President of the United States has submitted to Texas the first and second sections of the said resolution as the basis upon which Texas may be admitted as one of the States of the said Union; and whereas the existing government of the Republic of Texas has assented to the proposals thus made, the terms and conditions of which are as follows:

[Here follow the first and second sections of the resolution of the Congress of the United States, see page A-17]

Now, in order to manifest the assent of the people of this Republic as required in the above-recited portions of the said resolutions; We, the deputies of the people of Texas in Convention assembled, in their name, and by their authority, do ordain and declare, that we assent to, and accept the proposals, conditions, and guarantees contained in the first and second sections of the resolution of the Congress of the United States aforesaid.

Done at the City of Austin, Republic of Texas, July 4th, 1845.

THO. J. RUSK, *President.*

Phil. M. Cuny, H. G. Runnels, Robert M. Forbes, Sam. Lusk, Jno. Caldwell, Jose Antonio Navarro, Geo. Wm. Brown, Gustavus A. Everts, Lemuel Dale Evans, J. B. Miller, R. E. B. Baylor, J. S. Mayfield, R. Bache, James Love, Wm. L. Hunter, John D. Anderson, Isaac Parker, P. O. Lumpkin, Francis Moore, Jr., Isaac W. Brashear, Alexander M'Gowan, Isaac Van Zandt, S. Holland, Edward Clark, Geo. W. Smyth, James Armstrong, John M. Lewis, James Scott, Archibald M'Neill, A. C. Horton, Israel Standefer, Jos. L. Hogg, Chas. S. Taylor, David Gage, Henry J. Jewett, Cavitt Armstrong, James Power, Albert H. Latimer, Wm. C. Young, J. Pinckney Henderson, Nicholas H. Darnell, Emery Rains, A. W. O. Hicks, James M. Burroughs, H. L. Kinney, William L. Cazneau, A. S. Cunningham, Abner S. Lipscomb, John Hemphill, Van R. Irion, Volney E. Howard, E. H. Tarrant, Francis M. White, James Davis, George T. Wood, G. W. Wright, H. R. Latimer, W. B. Ochiltree, Oliver Jones, B. C. Bagby, Chs. Bellinger Stewart.

Attest.

JAS. H. RAYMOND,
Secretary of the Convention.

CONSTITUTION
Of The
REPUBLIC OF TEXAS*

WE, the People of Texas, in order to form a government establish justice, insure domestic tranquillity, provide for the common defence and general welfare; and to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution:

ARTICLE I.

SECTION 1. The powers of this government shall be divided into three departments, viz.: legislative, executive, and judicial, which shall remain for ever separate and distinct.

* * *

* Adopted in Convention on the 16th day of March, 1836; signed on the 17th of March; and ratified by a vote of the people, at an election held on the first Monday of September, 1836.

CONSTITUTION
Of The
STATE OF TEXAS
1845

WE, the People of the Republic of Texas, acknowledging with gratitude the grace and beneficence of God, in permitting us to make [a] choice of our form of government, do in accordance with the provisions of the Joint Resolutions for annexing Texas to the United States, approved March 1st, one thousand eight hundred and forty-five, ordain and establish this Constitution.

ARTICLE I.—BILL OF RIGHTS.

That the general, great, and essential principles of Liberty and Free Government may be recognized and established, we declare that—

* * *

SEC. 20. No power of suspending laws in this State shall be exercised, except by the Legislature, or its authority.

* * *

ARTICLE II.—DIVISION OF THE POWERS OF GOVERNMENT.

SECTION 1. The powers of the Government of the State of Texas shall be divided into three distinct departments, and each of them be confided to a separate body of magistracy—to-wit: those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of those departments, shall exercise any power, properly attached to either of the others, except in the instances herein expressly permitted.

ADMISSION OF STATE OF TEXAS INTO UNION

Joint Res. Dec. 29, 1845, 9 U.S. Stat. 108

Whereas, the Congress of the United States, by a joint resolution approved March the first, eighteen hundred and forty-five, did consent that the territory properly included within, and rightfully belonging to the Republic of Texas, might be erected into a new State, to be called the State of Texas, with a republican form of government, to be adopted by the people of said Republic, by deputies in convention assembled, with the consent of the existing government, in order that the same might be admitted as one of the States of the Union; which consent of Congress was given upon certain conditions specified in the first and second sections of said joint resolution; and whereas, the people of the said Republic of Texas, by deputies in convention assembled, with the consent of the existing government, did adopt a Constitution, and erect a new State with a republican form of government, and, in the name of the people of Texas, and by their authority, did ordain and declare that they assented to, and accepted the proposals, conditions, and guarantees contained in said first and second sections of said resolution; and whereas, the said Constitution, with the proper evidence of its adoption by the people of the Republic of Texas, has been transmitted to the President of the United States and laid before Congress, in conformity to the provisions of said joint resolution: therefore,

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the State of Texas shall be one, and is hereby declared to be one, of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever.

SEC. 2. *And be it further resolved,* That until the Representatives in Congress shall be apportioned according to an actual enumeration of the inhabitants of the United States, the State of Texas shall be entitled to choose two Representatives.

NOV 19 1979
JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 79-161

* * *

PHILIP ABBOTT MASQUELETTE,
Appellant,

V.

THE STATE OF TEXAS,
Appellee.

* * *

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

* * *

MOTION TO DISMISS

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 79-161

* * *

PHILIP ABBOTT MASQUELETTE,

Appellant,

V.

THE STATE OF TEXAS,

Appellee.

* * *

ON APPEAL FROM THE COURT OF
CRIMINAL APPEALS OF TEXAS

* * *

MOTION TO DISMISS

* * *

The Appellee, pursuant to Rule 16(1)(b) of the Rules of the Supreme Court, moves the Court to dismiss the appeal herein on the grounds that the questions sought to be reviewed were not properly raised below and expressly passed on, and that the questions presented are so insubstantial as not to need further argument.

I.

THE STATE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute

This appeal purports to raise the question of the validity of the Uniform Act Regulating Traffic on Highways, TEX.REV.CIV.STAT. Art. 6701d, §169B. The portion of the Act at issue provides that the Texas State Highway Commission may by order and without additional legislation set temporary maximum speed limits below the statutory maximum of 70 miles per hour, if the Commission finds certain circumstances to exist, including a severe shortage of motor fuel and the need to foster conservation. Pursuant to Article 6701d, §169B, the Commission has set the maximum speed limit in the State of Texas at 55 miles per hour.

Section 143 of the Act provides that it is a misdemeanor to violate any provision of the Act, including exceeding the applicable maximum speed limit. The maximum punishment for this misdemeanor is a $200 fine.

B. The Proceedings Below

The Appellant, an attorney licensed to practice law in the State of Texas, was convicted of the offense of speeding (exceeding the maximum 55 MPH set by the Commission) in violation of §§166 and 169B of the Uniform Act Regulating Traffic on Highways, Article 6701d, in the Justice of the Peace Court, Precinct 1, of Fayette County, Texas. An appeal *de novo* was taken to the County Court of Fayette County, and the Appellant, after a second trial to the Court was again convicted of speeding, and a fine of $101.00 was imposed. No jail sentence was imposed or could have been imposed under the statute for the violation charged.

On appeal to the Texas Court of Criminal Appeals, the Appellant urged that he was denied due process under the Fourteenth Amendment to the United States Constitution because he was tried before a non-lawyer county judge. Additionally, the Appellant argued that the statute -- Article 6701d, §169B, TEX.REV.CIV. STAT. -- enabling the State Highway Commission to set temporary speed limits was an unconstitutional delegation of the State's legislative authority under the Texas Constitution. Appellant did not challenge the validity of the statute under the United States Constitution in the Court of Criminal Appeals, nor did that Court expressly pass on the validity of the statute under the United States Constitution.

The Court of Criminal Appeals rejected Appellant's contention that he was denied due process under the Fourteenth Amendment when he was tried in the County Court before a non-lawyer judge and affirmed the conviction and fine. 579 S.W.2d 478 (Tex.Cr.App. 1979).

II.

ARGUMENT

A. The Validity of the Texas Statute Was Not Properly Raised Nor Expressly Passed On By the Texas Court of Criminal Appeals.

The Appellant contends that Section 169B of the Uniform Act Regulating Traffic on Highways, Art. 6701d, TEX.REV.CIV.STAT., is repugnant to Article IV, Section 4, of the United States Constitution (the Guaranty Clause). Appellant did not raise this contention in the state courts. Although he argued that Section 169B constituted an unlawful delegation of legislative power under the Texas Constitution, he did not raise the *federal* constitutional question in the Texas Court of Criminal Appeals. In fact, Appellant's Brief in that Court stated the issue to be:

> Section 169B, Article 6701d, V.A.T.S. is unconstitutional in that same attempts to

> delegate a function of the legislature to the executive department, . . . to pass a law without specific action by both houses of the legislature, . . . to suspend a law of this State without action by the legislature . . . .

Brief of Appellant at pp. 7-8. The opinion of the Court of Criminal Appeals did not decide the contention which the Appellant now raises in this Court, since it was not presented to that Court for consideration.

The Supreme Court of the United States has consistently ruled that before its jurisdiction can be invoked on appeal from a state court, it must appear that the validity of the state statute was raised in the state court at the proper time. *Tacon v. Arizona*, 410 U.S. 351, 352; *Cardinale v. Louisiana*, 394 U.S. 437, 438. Appellant's tardy attempt to raise this question in a petition for rehearing in the court below after judgment is improper and ineffective. *Radio Station W O W v. Johnson*, 326 U.S. 120, 128; *Herndon v. Georgia*, 295 U.S. 441, 443.

B. This Case Is Not Within The Appeal Jurisdiction of the Court.

No appeal from a state court judgment will lie unless there is drawn into question the constitutional validity of a state statute. Since Appellant did not properly raise the question of the validity of a state statute in the court below, and that Court did not consider or expressly decide the issue, there remains no basis for invoking the jurisdiction of the Supreme Court on appeal under 28 U.S.C. §1257(2).

C. The Appeal Does Not Otherwise Present a Substantial Federal Question.

The Appellant argues that his trial and conviction for speeding in the county court before a judge who was not a lawyer violated due process under the Fourteenth

Amendment. Although Appellant raised this contention in the Court below, it was properly rejected and is without merit.

The Supreme Court has never specifically addressed this issue. However, the courts of several states which have done so have concluded that the use of non-attorney judges is consistent with the demands of due process. *State v. Duncan*, 238 S.E.2d 205 (S.C. 1977); *Ex parte Ross*, 522 S.W.2d 214 (Tex.Cr.App. 1975), *cert. denied*, 423 U.S. 1018; *Ditty v. Hampton*, 490 S.W.2d 772 (Ky. 1972), *appeal dismissed*, 414 U.S. 885; *City of Decatur v. Kushmer*, 253 N.E.2d 425 (Ill. 1969); but cf. *Gordon v. Justice Court Yuba J.D. of Sutter Cty.*, 12 Cal.3d 323 (1974), *cert. denied*, 420 U.S. 938. (Right to lawyer-judge where jail sentence imposed).

It has never been suggested by this Court that the right to counsel carries with it the right to be tried by an attorney-judge, or that the right to be *tried* by a lawyer grows out of the right to be *defended* by a lawyer. *See Argersinger v. Hamlin*, 407 U.S. 25. Due process, as regards the tribunal hearing a case, has been considered to require only that the tribunal be fair and impartial or neutral and detached. *Morrissey v. Brewer*, 408 U.S. 471; *In re Murchison* 349 U.S. 133. Traditional concepts of fundamental fairness cannot be said to require that an accused be tried by a lawyer-judge, at least where, as in this case, the accused did not and could not suffer a deprivation of liberty. *Scott v. Illinois*, 440 U.S. 367.

Lastly, Appellant suggests that Texas' judicial structure which permits lay judges to preside in some county courts and law-trained judges in others denies him equal protection under the Fourteenth Amendment. This contention has already been considered and rejected by this Court. *North v. Russell*, 427 U.S. 328, 338.

III.

CONCLUSION

Wherefore, Appellee respectfully moves the Court to dismiss this appeal.

Respectfully submitted,

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November, 1979